Kvaerner Philadelphia Shipyard, Inc. *and* William Smith. Case 4–CA–32182

June 9, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 23, 2005, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's cross-exceptions, and the Respondent filed a reply brief to the General Counsel's answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

An arbitrator upheld the discharge of employee William Smith. The judge deferred to the arbitral decision and thus dismissed the 8(a)(3) allegation regarding Smith. Although asserting that he would find the discharge unlawful, the judge determined that the arbitrator's decision was not palpably wrong, and thus deferral was appropriate under Board law. For the reasons stated below, we agree with the judge's deferral finding.[2]

Facts

The Respondent operates a shipyard. William Smith, an employee and former shop steward, was active in employee affairs and frequently counseled employees on work-related matters. On June 1, 2003, Smith drafted and distributed a letter to his fellow employees. The letter reads as follows:

> To All Employees,
>
> Have you looked at your pay stubs for the month of May? There are 3 pay periods in the month of May. If you have medical and dental premiums taken out in addition to union dues, you are owed back money. Union dues, medical and dental are a set amount each month. The company takes it out in 2 payments each month; therefore, the third paycheck in May should not have had any deductions for union, medical and dental taken out. Who knows how long this has been happening. There are 2 months each year with 3 pay periods in them, and no deductions other than taxes should come out of the third pay period in these 2 months. Where is the extra money going? In addition to the extra money being taken out of your pocket, this money is probably being put into a bank earning interest. This interest is also due you. When you finally get this money back, as you will, demand that it be put into a separate check. If it is put in with your pay, more taxes will be taken out. This applies to current employees, as well as, employees no longer employed by Kvaerner. This could possibly be an honest mistake, however, it should be rectified.
>
> Sincerely,
>
> Bill Smith
> The Silent Shop Steward

It is undisputed that the claims Smith made in this letter were false. The Respondent was not taking improper deductions from employees' paychecks and placing the money in an interest-bearing account.

Smith distributed the letter to three employees on his way to work and left copies on the communal picnic table. He also delivered a copy to Nicholas Gabriele, his shop steward, who informed Smith that he should also take a copy to Paul Weininger, the Respondent's manager of human resources.

Later on the same day, Smith was called into the Respondent's office. Weininger handed Smith his termination papers and told Smith that he was fired. The termination papers stated that Smith had violated three company rules: (1) "gross misconduct" by impersonating a shop steward and by handing out false and misleading information with the intent to stir up employees; (2) violating company rules by distributing literature on company time without authorization from a supervisor; and (3) making false statements and thereby engaging in unauthorized use or disclosure of information. Weininger

[1] On June 24, 2005, the General Counsel filed a motion to strike portions of the Respondent's reply brief that cited recently issued Board cases not previously cited in these proceedings. In the alternative, the General Counsel sought permission to file a response addressing those cases. By letter dated July 19, 2005, the Board, by its Associate Executive Secretary, granted the General Counsel permission to file a limited response addressing the cases cited in the Respondent's reply brief. The General Counsel filed his response on July 21, 2005.

[2] Because we adopt the judge's finding that deferral to arbitration is appropriate in this case, we find it unnecessary to pass on the judge's finding that Smith was, in fact, discharged for engaging in protected concerted activity.

also informed Smith that he believed that Smith handed out the letters with the intent of inciting employees.

The Union filed a grievance over Smith's discharge and, following the Respondent's denial of the grievance at a third step hearing, the arbitrator upheld the dismissal. In his decision, the arbitrator concluded that Smith had engaged in gross misconduct "reasonably construed by the Company as defamatory and as an intentional act designed to damage the Company's relationship with its workers." The arbitrator then addressed Smith's argument that he was engaged in protected concerted activity. The arbitrator first acknowledged that:

> An employee need not limit his private utterances to individual co-workers concerning their employer while on Company premises to laudatory pleasantries. Employees may solicit information, articulate opinions, or engage in an informal "bull-session" discussion about the propriety of the Company's calculations without crossing a line demarcating misconduct.

However, the arbitrator distinguished Smith's conduct from the above permissible conduct:

> However, by publishing unjustified allegations of intentional bad faith to other employees without attempting to ascertain the facts . . . the grievant rendered himself vulnerable to the imposition of substantial discipline. . . . The grievant's intent was clearly to incite his co-workers, not to find an answer to his uncertainty. There is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action. His action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech under these circumstances . . . .

In addition, the arbitrator found that the Respondent reasonably construed Smith's letter as an "intentional act designed to damage the Company's relationship with its workers." The arbitrator also found that Smith's conduct amounted to "reckless disregard for the truth," noting Smith's failure to take any steps to ascertain the validity of his accusation prior to disseminating his letter. The arbitrator found that Smith intended to incite distrust among his fellow workers and caused "appreciable damage to the Company's reputation within the bargaining unit." The arbitrator concluded from the foregoing that the Respondent had sufficient cause to discharge Smith and upheld the discharge.

The judge found it appropriate to defer to the arbitrator's resolution of Smith's discharge. Although asserting that he would have found that Smith's actions were protected under the Act, he nonetheless found that deferral was warranted because the arbitrator's decision was not palpably wrong. In finding that the arbitrator's decision was not palpably wrong, the judge stated that "Smith went further, however, than merely voice his erroneous assumptions. He also queried what the Company was doing with the extra money, and stated that the 'extra money being taken out of your pocket . . . is probably being put into a bank earning interest' . . . Clearly, his erroneous accusations about the Company's ill-gotten gains was both, unnecessary to his stated purpose and, therefore, inflammatory."

Contrary to our dissenting colleague, we agree with the judge that deferral is appropriate in this case.

Discussion

The Board strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues such as that involved here. *Olin Corp.*, 268 NLRB 573, 574 (1984); *Aramark Services, Inc.*, 344 NLRB No. 68, slip op. at 2 (2005). Thus, where parties have agreed to be bound to an arbitrator's resolution of an issue, the Board will defer to that resolution except in those rare cases in which the arbitrator's decision is "palpably wrong." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1085 (2003), enfd. 99 Fed. Appx. 223 (D.C. Cir. 2004).

The burden is on the party opposing deferral to show that the arbitrator's decision is palpably wrong; the party must show that it is clearly repugnant to the Act and not susceptible to an interpretation consistent with the Act. *Martin Redi-Mix*, 274 NLRB 559 (1985). As the Board noted in *Aramark*, supra, this burden is a heavy one, and the Board will not lightly set aside an arbitrator's resolution of an unfair labor practice issue where the contractual issue was factually parallel, and the arbitrator was presented generally with the facts relevant to the unfair labor practice issue. Thus, even where the Board would reach a different conclusion than that of the arbitrator, deferral is appropriate if the arbitrator's conclusion is susceptible to an interpretation consistent with Board law. As the Board recently stated:

> The standard for determining whether an arbitral decision is clearly repugnant is whether it is "susceptible" to an interpretation consistent with the Act. *Olin*, 268 NLRB at 574; see *The Motor Convoy*, 303 NLRB 135 (1991). "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad pa-

> rameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award.

Smurfit-Stone Container Corp., 344 NLRB No. 82, slip op. at 2–3 (2005). If Board precedent exists that supports an arbitrator's decision, it cannot be said that the decision falls outside the broad parameters of the Act. Thus, such a decision is not palpably wrong or clearly repugnant to the Act, even if other Board precedent is arguably contrary to the arbitral decision. See *Marty Gutmacher, Inc.*, 267 NLRB 528–533 (1983) (Board adopted judge's deferral to an arbitrator's finding despite existence of Board cases to the contrary, because other Board cases supported the finding. The judge concluded that "there is simply no way I could find that [the arbitrator's] award . . . was 'palpably wrong as a matter of law'").

Under Board law, to find that the Respondent discharged Smith for engaging in protected concerted activity, the General Counsel must show that Smith was engaged in protected concerted activity, i.e., that Smith was acting for, or on behalf of, other workers or was acting alone to initiate group action, such as bringing group complaints to management's attention. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). However, Smith's statements would lose their protection if it is found they were made "with knowledge of [their] falsity, or with reckless disregard of whether [they were] true or false." *Linn v. Plant Guard Workers*, 383 U.S. 53, 61 (1966).

In his decision, the arbitrator considered the factors that constitute protected concerted activity. The arbitrator first acknowledged that certain employee speech is permissible, even if that speech is critical of the Respondent:

> An employee need not limit his private utterances to individual co-workers concerning their employer while on Company premises to laudatory pleasantries. Employees may solicit information, articulate opinions, or engage in an informal "bull-session" discussion about the propriety of the Company's calculations without crossing a line demarcating misconduct.

The arbitrator next found, however, that Smith's letter exceeded the boundaries of acceptable discourse:

> However, by publishing unjustified allegations of intentional bad faith to other employees without attempting to ascertain the facts . . . the grievant rendered himself vulnerable to the imposition of substantial discipline.

The arbitrator then concluded that Smith was not engaged in protected activity in "recklessly publishing accusations of dishonesty" leveled at the Respondent:

> There is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action. His action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech under these circumstances, when the grievant elected to ignore the appropriate and readily available avenues of inquiry and redress, and was in no way taken in concert with other employees.

We thus find that the arbitrator adequately addressed the components of the unfair labor practice allegation in finding that Smith had lost the protection of the Act. The arbitrator's ruling was premised on his factual finding that Smith had acted in reckless disregard for the truth and thereby committed defamation. Specifically, the arbitrator found that:

> Although [Smith] had no basis for his suppositions regarding the correct method of deducting and his suspicion of incorrect computation by the Company, he published and disseminated a written accusation addressed not to the Company or to the Union's hierarchy of officials, but to his co-workers, clearly implying that the Company may be intentionally cheating its current and retired employees. This unjustified attack was distributed to co-workers other than Union officials without taking any reasonable steps to determine the pertinent facts, either directly or with the assistance of the Union. Moreover, the grievant's conduct was clearly intended to incite his co-workers to distrust the Company's actions and motives. This action not only irresponsibly denigrated the Company's integrity to the bargaining unit, but also justified the imposition of substantial discipline for acting in bad faith by recklessly refusing to seek any accurate explanation for the phenomenon that the grievant found troubling.

Thus, the arbitrator made the factual determination that Smith had acted with reckless disregard for the truth, with the intent to incite employee distrust of the Respondent and to defame the Respondent. Based on that finding, the arbitrator concluded that Smith's actions exceeded the bounds of protected activity.

This conclusion is not inconsistent with Board precedent. The Board has found that employees lose the protection of the Act by acting with reckless disregard for the truth. For instance, in *Hertz Corp.*, 326 NLRB 1097 (1998), the Board deferred to an arbitrator's finding that an employee's letter to employees—which falsely stated that he had been told he would be discharged if he wrote any more such letters—was not protected by the Act be-

cause it was a deliberate and/or reckless falsehood. Similarly, in *Pizza Crust Co.*, 286 NLRB 490 (1987), enfd. 862 F.2d 49 (3d Cir. 1988), the Board found that an employee letter falsely stating that his employer fixed the books was a reckless untruth that placed that employee outside the protection of the Act.

In *Sprint/United Management Co.*, 339 NLRB 1012, 1019 (2003), the judge found that some statements were made with knowledge of their falsity, others were made with reckless disregard for the truth or falsity, and still others fell into neither category. The judge upheld the discharge because of the statements in the first two categories. The Board agreed. Similarly here, the arbitrator found that Smith acted with reckless disregard for truth or falsity. In *Stanley Furniture Co.*, 271 NLRB 702 (1984), the Board found that an employee acted "with deliberate intention to damage the [r]espondent or with reckless disregard for the truth" when he publicly and falsely asserted that the company was calling the fire department to its plant almost daily, without first attempting to determine the actual number of times the fire department had been called. Although the conduct in *Sprint/United Management*, supra, was more extreme than the conduct found in the arbitrator's decision here, that case and this one are materially alike: in each, the false assertions were found to have lacked any basis in the hearsay claims of others. And as in *Stanley Furniture*, supra, the Board found that Smith made no attempt to ascertain the truth before publishing his false statements.

Our colleague contends that the above cases are distinguishable because Smith honestly believed what he was saying with regard to the Respondent's payroll deductions. However, as the judge finds, "Smith went further, however, than merely voice his erroneous assumptions. He also queried what the Company was doing with the extra money, and stated that the 'extra money being taken out of your pocket . . . is probably being put into a bank earning interest.'" Further, Smith's belief was not based on any checking of the facts. Rather, the arbitrator found that Smith acted with reckless disregard of the truth.

The arbitrator's factual finding here, that Smith had acted with reckless disregard for the truth, is not palpably wrong, and is susceptible to an interpretation consistent with Board precedent. We therefore find that deferral is appropriate.

Our dissenting colleague says that the arbitrator's findings are wrong as a matter of law. We disagree. The standard of "maliciously false" applies not only to statements that are made with knowledge of falsity but also to statements made with reckless disregard of the truth. As noted, the arbitrator found that Smith acted in reckless disregard of whether his accusations were true. The arbitrator backed up his finding with evidence that Smith failed to seek any accurate explanation of the Respondent's conduct, and ignored readily available avenues of inquiry. In our view, these facts lend support to a "reckless disregard" finding by the arbitrator. Again, the issue is not whether we would find "reckless disregard" but rather whether the General Counsel has shown that this finding is palpably wrong or clearly repugnant to the Act.

Stating that graver false accusations than Smith's have been found protected, our colleague cites four Board cases: *Ben Pekin Corp.*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1971); *KBO, Inc.*, 315 NLRB 570 (1994), enfd. mem. 96 F.3d 1448 (6th Cir. 1996); *Tradewest Incineration*, 336 NLRB 902, 907 (2001); and *United Cable Television Corp.*, 299 NLRB 138 (1990). These cases are distinguishable. In *KBO*, the Board found that the employee had not acted in reckless disregard of the truth because the employee had merely repeated a false statement he had heard from someone else, not knowing it to be false. 315 NLRB at 570–571. Here, by contrast, it cannot be said that Smith was misled; Smith had no basis in other employees' statements for his false assertions concerning the Respondent's payroll deductions. The arbitrator found that Smith acted in reckless disregard of the truth, and there is no basis for overturning that factual finding. In *United Cable Television*, the Board refused to defer to an arbitral award. The Board relied principally on the fact that the arbitrator found that the employee's conduct was "partially protected." The Board noted that the concept of partial protection "is not recognized under the Act." By contrast, the concept that remarks can be unprotected by reason of their reckless disregard for the truth is recognized by the Act. Similarly, that case, unlike the instant one, does not involve an arbitral finding of reckless disregard for the truth.

Ben Pekin, supra, and *Tradewest Incineration*, supra, are similarly distinguishable. In both cases, the Board found that an employee had engaged in protected concerted activity. However, neither case involved findings that the employees' statements were made with reckless disregard for the truth. Specifically, in *Tradewest*, the Board found that the statement was made on the basis of an incorrect perception. In *Ben Pekin*, the Board found that the employee's statements were based on a "genuine" mistake of fact, i.e., conduct different from that engaged in with reckless disregard for the truth. In short, in neither case is there a finding of a reckless disregard of the truth. In the instant case, the arbitrator found that there was a reckless disregard of the truth.

If, and to the extent that, the cases our colleague cites would tend to support a finding that Smith's falsehoods did not sacrifice the Act's protection, those cases do not make the arbitrator's award palpably wrong because, as explained above, other Board decisions support a finding that Smith did lose the Act's protection. In light of those decisions, the arbitral award cannot be clearly repugnant to the Act, notwithstanding the decisions cited by our colleague. See *Marty Gutmacher*, supra.

In contending that deferral is not warranted in this case, our colleague argues that "there is no way to read the arbitrator's award as consistent with the Act." However, at the heart of our colleague's dissent is her disagreement with the arbitrator's *factual* determination that Smith acted with reckless disregard for the truth. As noted above, we do not say that we would have made the same factual finding. We simply say that this factual finding of the arbitrator, who heard the relevant testimony, including the testimony of Smith, is one to which we would defer.[3] And, given that arbitral finding, the arbitrator's decision to uphold the discharge is consistent with Board law. Under that law, cited above, statements in reckless disregard of the truth can form a valid basis for discharge under the Act.[4] Thus, it is clear that the arbitrator's award is not inconsistent with the Act or palpably wrong.[5]

Our colleague treats the arbitrator rather harshly. According to the dissent, "no reasonable adjudicator applying the Act faithfully could have reached [his] result." However, the validity of the dissent's attack turns on whether Smith acted in reckless disregard for the truth. If Smith did so act, even our colleague would concede that the discipline was lawful. The arbitrator found that Smith did act in this manner. As shown above, we believe that the arbitrator set forth an adequate basis for this fact finding. Concededly, another arbitrator could have made a contrary finding. The difference between ourselves and the dissent is that she believes that only one fact finding is permissible, and we disagree.

Ultimately, our colleague is reduced to suggesting that the *Olin* standard should be abandoned. In this regard, our colleague cites a law review article that is critical of the Board's *Olin* policies. We decline to reverse those well-settled principles. Instead, we apply them here.

Our colleague does not confine her attack to the arbitrator. She criticizes the Board majority as well. She says that the Board has shown a "disturbing willingness to defer to arbitration awards that are flatly inconsistent with the Act." In support of this assertion, she cites her own dissenting opinions. This is not the place to rehash those cases. The majority and the dissent have spoken, and those opinions speak for themselves. We here decide this case on its own facts, nothing more and nothing less.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. June , 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

The Respondent fired employee William Smith for distributing a letter to coworkers criticizing the Respondent for erroneously deducting medical, dental, and union dues from the employees' paychecks. Although the National Labor Relations Act clearly shielded Smith's conduct, an arbitrator upheld his discharge. The majority errs in deferring to the arbitrator's award. It cannot be reconciled with basic statutory principles governing concerted protected activity. Because the arbitrator's decision was not just wrong, but was "palpably wrong" under

[3] Our colleague says that deferral to an arbitral decision is not appropriate where the arbitrator's decision "is based on a legal framework that is antithetical to the Board's approach." We would agree that where the Board law is clearly established, and the arbitral opinion can only be interpreted in a way that is contrary to that law, deferral would be inappropriate. However, as we have shown, the arbitral decision here is based on the *fact-finding* that the employee acted in reckless disregard of the truth, and there are Board decisions which conclude that such actions are unprotected. Even if the Board, on its own, would have made a different factual finding, and even if there is some case support for a contrary legal conclusion, that is not sufficient to warrant nondeferral to that arbitral decision.

[4] Our colleague cites *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 685 (1989), for the asserted proposition that the issue of "whether there is actual malice" is a question of law and not of fact. In truth, the case holds that the question of whether there is sufficient evidence in the record to support a finding of actual malice is a question of law. By contrast, the issue in the instant case is whether the arbitrator's finding of "reckless disregard" is so baseless as to be repugnant to the policies of the Act. We think that the arbitrator had an adequate basis for making this finding.

[5] Thus, our colleague's reliance on *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176 (1997), enfd. 200 F.3d 230 (5th Cir. 1999), and *110 Greenwich Street Corp*, 319 NLRB 331, 335 (1995), is misplaced. In those cases, the arbitrator upheld the dismissals without addressing the protected nature of the employee's conduct. Here, the arbitrator adequately addressed that statutory issue. Similarly, *Garland Coal & Mining Co*., 276 NLRB 963 (1985), cited by our colleague, is distinguishable because the arbitrator in that case ignored the statutory significance that the employee at issue was acting as a union representative.

the *Olin* standard,[1] we cannot give it deference without compromising our duty to administer the Act.

I.

When William Smith looked at his pay stubs for the month of May 2003, he concluded that the Respondent's deductions for medical and dental premiums and union dues were too high. Smith wanted to tell other employees about his discovery. As it turned out, he was wrong about the deductions, which, in fact, were proper under customary practice. Thus, although May 2003 had three pay periods (instead of the usual two pay periods), Smith erroneously thought that premiums and dues customarily were deducted only twice a month. As became clear, premiums and dues properly were deducted each and every pay period of the month, including in those months having three pay periods. But, in light of his concerns at the time, Smith wrote and distributed a letter to his fellow employees regarding this matter.

Smith's letter can be separated into three themes. Initially, Smith explains why he thinks that the third paycheck of the month should not have deductions for medical and dental premiums and dues. Next, Smith asks how long this has been happening and inquires as to "where is the extra money going?"—concluding that it is probably in a bank earning interest. He urges employees to seek reimbursement by separate check to avoid a tax liability and to recoup their lost interest. Finally, Smith states in the letter that "(t)his could be an honest mistake, however, it should be rectified." The letter is signed by Smith, with the title "The Silent Shop Steward."

When the Respondent reviewed Smith's letter, it fired him, citing (among other grounds) his impersonation of a shop steward, his distribution of false and misleading information with an intent to stir up employees, and his distribution of literature on company time and without a supervisor's authorization. The Union grieved Smith's discharge, which was ultimately upheld by an arbitrator. The arbitrator found that Smith did not engage in protected concerted activity.

The Board's administrative law judge in this case found that Smith simply made a mistake about the deductions, that he did not deliberately misrepresent any facts, and that his distribution of the letter was protected by Section 7 of the Act. But while the judge accordingly concluded that the arbitrator was "wrong," he deferred to the arbitrator's award, as neither "palpably wrong or totally unjustified."

[1] *Olin Corp.*, 268 NLRB 573, 574 (1984).

II.

The judge was correct in finding Smith's letter protected, a conclusion supported—indeed, compelled—by Board precedent.[2] The judge erred, however, in concluding that deferral was appropriate. The Board has repeatedly refused to defer to arbitration awards sustaining discharges that were based on activities protected by Section 7.[3] This is such a case.

A.

The Board has a long history of scrutinizing discipline imposed on employees for complaining to fellow employees about pay or working conditions and accusing their employers of some form of impropriety based on—as it turns out—unfounded factual predicates. Under well settled Board law, these kind of accusations are protected under Section 7 unless they are "so offensive, defamatory or opprobrious" as to render the employee unfit for service with the employer. *Ben Pekin Corp.*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1971). A statement alleged to be libelous or defamatory will not lose its protection unless it is made "with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966).

Although Smith closed his letter with the admission that "this could be an honest mistake" on the part of the Respondent, it is true that the letter perhaps can be read as at least implicitly raising the possibility of impropriety, i.e., "where is the extra money going?" In context, however, it is plain that Smith is simply alerting his fellow employees to the fact that the Respondent is retaining money that, in Smith's view, actually belongs to employees and should be reimbursed to them, with interest. Smith's letter pertains to the Respondent's contractual and legal obligations with respect to benefits and what is owed to employees. In that sense, Smith's letter is a classic example of an employee expressing his concerns to his fellow employees about an alleged improper loss of pay and benefits.

It does not matter whether Smith was right or wrong, brave or foolish, in his interpretation of the Respondent's contractual obligations. Our precedent gives employees wide leeway in expressing their concerns about alleged shortfalls in pay and working conditions. Section 7 does not require that employees speak with "a degree of finesse and gentility" that might be prudent in other social

[2] The majority finds it unnecessary to pass on this finding, given its view that deferral to arbitration is appropriate here.

[3] See *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176, 179 (1997), enfd. 200 F.3d 230 (5th Cir. 1999); *110 Greenwich Street Corp.*, 319 NLRB 331, 335 (1995); *Garland Coal & Mining Co.*, 276 NLRB 963, 964 (1985).

contexts. *Cement Transport Inc.*, 200 NLRB 841, 845 (1972), enfd. 490 F.2d 1024 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974). Put another way, the Board recognizes that Section 7's right to complain concertedly about working conditions will occasionally work to shield statements that are factually incorrect and even misguided.

Indeed, even if Smith's letter is viewed as an accusation of impropriety, Section 7 has been found to encompass and protect accusations of graver impropriety than occurred here. In *Ben Pekin*, supra, an employee was discharged for suggesting that his employer received an under-the-table "payoff" to divert raises intended for employees. The Board (and court) found the statement to be a good-faith mistake of fact and protected under the Act even though there was no evidence of any such payoff. In *KBO, Inc.*, 315 NLRB 570 (1994), an employee told other employees that there was a tape recording of a high management official admitting to taking money out of employees' profit-sharing plans and diverting it to lawyers opposing a union campaign. The statement was found to be in good faith and protected, even though there was no evidence such a tape existed. In *Tradewest Incineration*, 336 NLRB 902, 907 (2001), an employee was suspended for distributing erroneous information about wages paid by the employer to another employee. The Board found the conduct to be protected because it was not deliberately or maliciously false but simply inaccurate. In *United Cable Television Corp.*, 299 NLRB 138 (1990), an employee accused the company president of telling untruths to employees and questioned why the company was not putting more money in the pockets of employees. The Board found the statements to be protected and the discipline of the employee to be unlawful.

The majority's attempt to distinguish these cases is unavailing. The majority claims that *Ben Pekin*, supra, did not involve allegations of reckless disregard of the truth, but only pertained to whether the employee had engaged in protected concerted activities. This reasoning is circular. It is true that the Board found that the conduct in *Ben Pekin* was protected. But, it did so only after finding that the employee's comments were not defamatory. This finding, of course, encompasses the reckless disregard of the truth standard. Rather than attempt to distinguish *Ben Pekin* on this basis, my colleagues would be better served to heed the admonition of the *Ben Pekin* Board, rejecting the defamation argument: "to hold otherwise, because of a genuine mistake of fact on the part of an employee, would severely curtail employees' rights to act on behalf of themselves and their fellow employees." 181 NLRB at 1025. The majority makes a similar claim with respect to *Tradewest Incineration*, supra. But there too, the Board found the defamation standard was not met because there was no evidence of a deliberate or malicious falsehood. 336 NLRB at 907. The majority claims that *United Cable*, supra, is distinguishable on the same circular basis. But *United Cable* could hardly be more on point. There, an employee wrote a letter to his fellow employees about a monetary issue, an arbitrator found that the letter was inflammatory and disruptive, the General Counsel asserted that the defamation standard was not met, and the Board examined the content of the letter and determined that the General Counsel was correct and declined to defer to the award. Finally, the majority claims that *KBO, Inc.* supra, is distinguishable because the employee there was misled by another employee and, here, Charging Party Smith was wrong on his own. This is a distinction without a difference. What matters is that, in both *KBO, Inc*. and here, the employees honestly believed what they were saying and had no actual malice, whatever the source of their misconception of the facts.

In the present case, Smith did not accuse the employer of a "payoff" or of diverting funds to undermine unionization, or the like. And, even if he had, our precedent teaches that the activity would be protected so long as it was not deliberately or maliciously or recklessly false. As the judge found, Smith simply made a mistake of fact. This error did not cost him the protection of the Act. The cases cited by the majority to support dismissal of the complaint are readily distinguishable.

In *Hertz Corp.*, 326 NLRB 1097, 1101 (1988), an employee lied and engaged in dishonesty in his letters of complaint. In the present case, as the judge found, Smith honestly believed that his statements were correct.

In *Pizza Crust Co.*, 286 NLRB 490, 505–507 (1987), enfd. 862 F.2d 49 (3d Cir. 1988), an employee fabricated a story that an employer fixed his books, apparently out of whole cloth. In the present case, Smith made statements that he honestly believed were true.

In *Sprint/United Management Co*., 339 NLRB 1012, 1018–1019 (2003), an employee's testimony about the basis for her assertions regarding possible anthrax contamination was discredited and key elements of her statements to other employees were made with knowledge of their falsity. Further, as noted in my concurrence in that case, the employee's communication there was likely to cause unnecessary fear and even panic among her fellow employees. In the present case, Smith did nothing more than circulate a letter about the employer's paycheck deductions and did not know that his assertions were incorrect.

In *Stanley Furniture Co*., 271 NLRB 702 (1984), the Board found that an employee's public remarks before a

city council about his employer were malicious and may have been made deliberately to damage the employer. In the present case, as the judge found, Smith "did not deliberately misrepresent the facts in making his accusations against the employer."

In short, all of the cases cited by the majority involve some form of actual malice raising the purposeful avoidance of the truth by the offending employee. In the present case, Smith honestly believed what he was saying and simply erred in his suppositions about the employer's conduct. This distinction is crucial because, as explained below, governing Supreme Court precedent guides our application of "actual malice" or "reckless disregard of the truth" principles.

B.

The question, then, is whether the decision of the arbitrator, who found to the contrary, is somehow "susceptible to an interpretation consistent with the Act" or, instead, is "clearly repugnant" to it: i.e., "palpably wrong." *Olin Corp.*, supra, 268 NLRB at 574. There is no way to read the arbitrator's award as consistent with the Act.

First, the arbitrator ignored Board principles and policies, reflected in the cases already discussed, with regard to the protected expression of concerns and criticism about employer wages and benefits. This is perhaps best exemplified by the arbitrator's finding that Smith exceeded the bounds of "fair comment" or personal opinion. "Fair comment" is not the measure of the Act's protection. Plainly, the arbitrator applied an erroneous standard and reached a result incompatible with our case law pursuant to that standard.[4]

Second, the arbitrator erroneously grounded his decision on a finding that Smith improperly engaged in "self-help," that is, distributing the letter to employees instead of pursuing other possible avenues of inquiry and redress. In this regard, the arbitrator found that Smith violated his "obligation of fair dealing" with the Respondent and "flout(ed)" and circumvented the established grievance procedure. But there is nothing in Smith's conduct that reasonably can be viewed as undermining the parties' grievance procedure under the principles of *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). Smith did not seek to bargain directly with the Respondent. His letter is directed, in the first instance, to his fellow employees for their consideration (not the Respondent), and there is no evidence that Smith's letter undermined the Union's bargaining goals. Indeed, the Union filed a grievance on Smith's behalf to protest his discharge.

Third, the arbitrator erroneously found that Smith did not engage in concerted activity. He did so even though the arbitrator elsewhere in his award found that Smith intended to communicate with and influence other employees to action—activity that the arbitrator viewed as "intended to incite." It is well settled that concerted activity encompasses those circumstances, as here, where individual employees seek to initiate or to induce group action. *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). "Incitement" or not, Smith's conduct was concerted because it was a call from one employee to other employees to initiate or induce group action. The arbitrator plainly erred in finding to the contrary.

Finally, the arbitrator was clearly wrong to suggest that Smith's failure to inquire of the company or the union steward prior to distributing the letter demonstrates that he acted in reckless disregard of the truth. Smith honestly believed, as the judge found, that his interpretation of the benefits and dues-deduction requirements was correct. Smith did not make up a story that he knew to be false, nor is there any showing that he possessed contrary evidence about the Respondent's obligations that he chose to ignore. Smith was wrong and nothing more. Further, the arbitrator's analysis suggesting that Smith should have "inquired of the company" before distributing the letter would seemingly require an employee to first check matters out with management before communicating with fellow employees, at the risk of losing the protection of the Act. That is not the law. Nor does Section 7 require that an employee seek clarification about wages and benefits from the union before communicating with employees. Although such communication to management and/or the union may have been advisable in these circumstances as a practical matter, Section 7 is not so circumscribed. See *KBO, Inc*., supra, 305 NLRB at 571 fn. 6 (employee has no affirmative obligation to verify); *HCA/ Portsmouth Regional Medical Center*, 316 NLRB 919 fn. 4 (1995) (no obligation to investigate or verify in absence of knowledge of falsity or reason to know of falsity).

In short, whatever legal principles the arbitrator applied here, they did not have their origin in the National Labor Relations Act or Supreme Court precedent. No

[4] In deferring to the award, the judge relied on *NLRB v. Pincus Bros., Inc.*, 620 F.2d 367, 374 (3d Cir. 1980), denying enforcement to *Pincus Bros.*, 237 NLRB 1063 (1978), a case the judge found to be analogous. The *Pincus* court found that deferral was appropriate, contrary to the Board's decision not to defer. But, as the judge noted here, the court's decision appears to be based, in part, on its finding that the disciplined employee's leaflet contained material about the employer's products and policies that the employee knew to be false. That is not the case here.

reasonable adjudicator applying the Act faithfully could have reached the same result.

The majority contends that deferral is appropriate because the arbitrator found that Smith acted with reckless disregard of the truth. What my colleagues seemingly fail to grasp is that the arbitrator's concept of "recklessness" is wholly at odds with not only Board precedent, but with Supreme Court precedent as well.

The "reckless disregard of the truth" standard is satisfied only when a statement has been made with a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).[5] The statement must amount to a purposeful avoidance of the truth. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989). In the present case, as the judge found upon hearing his testimony, Smith "honestly believed that he was correct" and "did not deliberately misrepresent the facts." Nothing in the arbitrator's decision is to the contrary. In short, Smith made certain suppositions and those suppositions turned out to be false. This is not even close to satisfying the standard for reckless disregard of the truth.

As noted, the arbitrator applied a wholly different (and incorrect) standard. This was an error of law—and not simply a mistaken factual determination, as the majority mistakenly asserts. See, e.g., *Harte-Hanks Communications*, supra, 491 U.S. at 685–686. Indeed, the majority emphasizes that it is simply deferring to the arbitrator's findings of fact: "as we have shown, the arbitral decision here is based on the fact-finding that the employee acted in reckless disregard of the truth." The majority is wrong when it claims that reckless disregard of the truth is simply a factual question. As the Supreme Court made clear in *Harte-Hanks Communications* "the question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice *is a question of law*." 491 U.S. at 685 (emphasis added). In short, the majority's deferral analysis is based on a fundamental misconception. And, even in deferral cases, the Board must apply the law to the facts. Here, the majority mischaracterizes the arbitrator's findings of recklessness as simply issues of fact and then compounds this error by failing to address governing Supreme Court precedent on the legal question of reckless disregard of the truth.

The arbitrator considered Smith to have been reckless because he failed "to seek any accurate explanation." He also found that Smith was reckless because he "ignore(d) the appropriate and readily available avenues of inquiry and redress." Put another way, the arbitrator disapproved of Smith's tactics—conduct that the arbitrator found to be "self-help." But a failure to investigate does not in itself constitute a reckless disregard of the truth. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968). There is no showing that Smith had serious doubts about his statements, much less a high degree of awareness of probable falsity. This is the factual predicate for finding a reckless disregard of the truth. Instead of applying the appropriate legal standard—or at least something in the vicinity of the correct standard—the arbitrator concocted a standard based on his personal view of the appropriateness of Smith's "self-help" tactics. No binding Board or Supreme Court precedent supports the arbitrator's idiosyncratic application of the "reckless disregard" standard, or the majority's puzzling deference to it.

In the end, it is clear that the arbitrator's conception of recklessness is grounded on nothing more than Smith's failure to "inquire" and the propriety of going around established channels. The majority does not explain how this rationale is compatible with governing Board and Supreme Court precedent.[6] As explained above, Smith's failure to inquire plainly does not constitute reckless disregard of the truth under that precedent. Equally deficient is the grounding of the arbitrator's finding of recklessness on the purported absence of concerted activity.[7]

[5] The majority gives short shift to the principles set forth in the governing Supreme Court cases noted below. Thus, my colleagues simply note, without discussion, that the arbitrator found that the "standard was met." This, of course, only begs the question of whether the arbitration award has any coherent basis under settled law. It does not.

[6] Citing *Marty Gutmacher, Inc.*, 267 NLRB 528 (1983), the majority asserts that "[i]f Board precedent exists that supports an arbitrator's decision," then the decision cannot be palpably wrong, "even if other Board precedent is arguably contrary to the arbitral decision." Here, as I have shown, *no* Board precedent genuinely supports the arbitrator's decision.

The majority's test has a dubious origin. It was not articulated by the Board in *Marty Gutmacher*, supra. In that case, decided by a three-member panel, the Board affirmed the decision of an administrative law judge, deferring to an arbitration award. Member Hunter concurred in the result. See 267 NLRB at 528 fn. 1. Member Jenkins dissented. Id. at fn. 2. The Board's decision, then, would seem to be limited to its facts and to stand for no general legal proposition.

It is certainly true that "to warrant deferral, an arbitrator's award need not be totally consistent with Board precedent." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1085 (2003). The test is whether the award is "susceptible to an interpretation consistent with the Act." Id. In some areas, Board precedent establishes a legal framework allowing for a range of permissible decisions in particular cases, depending on their factual circumstances. See id. (Board's cases involving right to wear union insignia "turn[] on fine distinctions involving a balancing of respective statutory interests and on unique factual circumstances".)

But where the arbitrator's decision is based on a legal framework that is antithetical to the Board's approach, then deferral is not appropriate. See, e.g., *Kohler Mix Specialties*, 332 NLRB 630, 531 (2000); *Columbian Chemicals Co.*, 307 NLRB 592, 592 fn. 1 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1993). This is such a case.

[7] The arbitrator found that Smith's "action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech . . . and was in no way taken in concert with other em-

As I have explained, there is no basis under our precedent for the arbitrator's finding—and the majority apparently agrees because its opinion does not embrace the arbitrator's finding as to concertedness.

III.

It is wrong for my colleagues to defer to the application of a standard that bears little or no relationship to the governing law. But recently, the Board has shown a disturbing willingness to defer to arbitration awards that are flatly inconsistent with the Act.[8] The Federal labor policy favoring arbitration does not mandate that approach, and our precedent does not permit it.[9] There *are* limits to the lengths to which the Board may go in deferring to arbitration. Were the majority's approach to deferral here correct, then so would be a recent criticism of the Board's current deferral doctrines:

> The combination of the *Collyer [Collyer Insulated Wire*, 192 NLRB 837 (1971)] and *Olin [Olin Corp.*, 268 NLRB 573 (1984)] doctrines constitutes a general refusal by the Board to enforce statutory rights during the term of an agreement. It has ceded this role to decision makers who are not expert in interpreting the law and a process that is not devised for dealing with difficult statutory issues. Thus, when it comes to protecting Section 7 job rights, the Board is ineffectual prior to unionization and largely indifferent thereafter.

Julius Getman, The National Labor Relations Act: What Went Wrong; Can we Fix It?, 45 Boston College Law Rev. 125, 133–134 (2003).

Contrary to the majority, I would not defer to the arbitrator's award, because it was palpably wrong and repugnant to the Act. In turn, I would find that the Respondent violated Section 8 (a) (1) and (3) by discharging Smith on the basis of his exercise of protected concerted activities. Accordingly, I dissent.

Dated, Washington, D.C. June 9, 2006

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Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Edward J. Bonett, Jr., Esq., for the General Counsel.
John B. Langel and *Jason A. Collier, Esqs. (Ballard, Spahr, Andrews, & Ingersoll, LLP)*, of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on December 15, 2004. The charge was filed by William Smith, an individual, on June 2, 2003, and the complaint issued on July 27, 2004, alleging that the Respondent, Kvaerner Philadelphia Shipyard, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging its employee, William Smith, because he engaged in concerted protected activities. The Respondent filed an answer to the complaint, admitting certain jurisdictional elements raised in the complaint, and denying that that it had violated the Act, stating that the discharge of the employee had been found justified after a full and fair hearing by an arbitrator.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation with a facility at the Philadelphia Naval Business Center, 2100 Kitty Hawk Avenue, Philadelphia, Pennsylvania, is engaged in the construction and building of ships. With sales and shipments of goods valued in excess of $50,000 directly from points outside the State of Delaware, the Company is admittedly an employer engaged in commerce within Section 2(2), (6), and (7) of the Act.

The Union, International Brotherhood of Boilermakers, Iron Ship Builders, Forgers & Helpers Local Lodge Number 19, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The instant controversy arose when William Smith, one of the Respondent's employees, addressed a letter to all employees questioning the Company's payroll deductions for union dues and medical and dental benefits from their paychecks. Instead of directing any inquiries to his Union or to his Employer with his concerns, Smith took it upon himself to involve his coworkers.

The Company and the Union have maintained a bargaining relationship and are bound by a collective-bargaining agreement, effective August 23, 2003, through December 31, 2006 (Jt. Exh. 4). Smith, a member of the Union and a past shop steward, was employed as a bender and machinist at the Philadelphia Shipyard since August 2001. He was discharged on June 2, 2003, for handing out a flyer, addressed to all employees and signed, The Silent Shop Steward. Smith had drafted his letter on June 1, 2003, because, in his words, he "wanted to avoid confrontations, and an answer to [his] question [w]ere

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ployees. Had he inquired of the Company or waited until his Union could obtain an answer, the grievant would have been immune from discipline."

[8] See *Smurfit-Stone Container Corp.*, 344 NLRB No. 82, slip op. at 4 (2005) (dissenting opinion); *Aramark Services, Inc.*, 344 NLRB No. 68, slip op. at 4 (2005) (dissenting opinion).

[9] *Garland Coal*, supra, 276 NLRB at 964–965.

[1] The General Counsel's Motion to Correct Transcript is granted.

they making the payroll deductions properly." He accordingly drafted the following letter (Jt. Exh. 1):

> To All Employees,
>
> Have you looked at your pay stubs for the month of May? There are 3 pay periods in the month of May. If you have medical and dental premiums taken out in addition to union dues, you are owed back money. Union dues, medical and dental are a set amount each month. The company takes it out in 2 payments each month; therefore the third paycheck in May should not have had any deductions for union, medical and dental taken out. Who knows how long this has been happening. There are 2 months each year with 3 pay periods in them, and no deductions other than taxes should come out of the third pay period in these 2 months. Where is the extra money going? In addition to the extra money being taken out of your pocket, this money is probably being put into a bank earning interest. This interest is also due you. When you finally get this money back, as you will, demand that it be put into a separate check. If it is put in with your pay, more taxes will be taken out. This applies to current employees, as well as, employees no longer employed by Kvaerner. This could possibly be an honest mistake, however, it should be rectified.
>
> Sincerely,
>
> Bill Smith
> The Silent Shop Steward

Smith testified that he referred to himself as the silent shop steward, because his co-workers continued to seek his advice on contract issues, even though he had earlier been removed as a shop steward. Smith testified that he distributed the letter to three employees, Tom Dietry, Dan Bennett, and Bill Haigs in the morning on his way to work, and suggested that they provide a copy to their respective shop stewards. He also left copies on the picnic table and handed the letter to Nicholas Gabriele, his shop steward. Gabriele informed Smith that he would take it to Paul Weininger, manager of human resources.

In the afternoon of the same day, Smith was called into the office. His termination papers had already been prepared. Handing him the termination statement and, without any further discussion, Weininger told Smith, he was fired and asked him to sign the papers. The termination statement cited three infractions of company rules: First, "gross misconduct" by illegally impersonating a shop steward and handing out false and misleading information with the obvious intent to stir up the employees, second, "refusal to abide by KPSI rules" by distributing such literature on company time and without authorization from a supervisor, and three, "unauthorized use or disclosure of information" by making false statements regarding information about pay and taxes (Jt. Exh. 5). During that brief meeting in the office, Weininger also expressed his view that Smith handed out his letter with the intent to start negative reactions from his coworkers.

The Union filed a grievance at Smith's behest. By letter of June 13, 2003, the Company informed Smith that his grievance was denied after a third step hearing (Jt. Exh. 6). The Union, contending that Smith acted within his right protected by law, submitted the issue to arbitration. Following a hearing on January 30, 2004, before an arbitrator, a decision issued on April 25, 2004, upholding the Company's actions (Jt. Exh. 3).

The General Counsel, in disagreement with the arbitrator's award, filed the complaint in this case, alleging that the discharge of William Smith for addressing the letter to other employees encouraging them to question the Respondent's payroll deductions violated the Act. This presents the issues, whether the Board should defer to the arbitrator's award.

Analysis

The party opposing the award has the burden to show that deference to an arbitration decision is inappropriate. *Turner Construction Co.*, 339 NLRB 451 (2003). Under well-established law, deference is proper where the arbitration proceeding has been fair and regular, where the parties agreed to be bound, and where the award is not repugnant to the Act, and the unfair labor practice issue has been considered. *Spielberg Mfg.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984); *Mobil Oil*, 325 NLRB 176 (1997, enfd., 200 F.3d 230 (5th Cir. 1999).

Here, the parties agree that the first two criteria have been met and are not in issue. The General Counsel, however, argues "that the arbitration decision was clearly repugnant to the Act, and that it has met the burden for rejecting deferral." The General Counsel reasoned that the Respondent clearly discharged Smith in retaliation for his protected concerted activity that Smith's conduct was not outside the bounds of protected activity that the arbitrator failed to find protected activity, that he erroneously found that Smith lost the protection of the Act and improperly relied on the manner in which he signed his letter. The Respondent argues that the arbitrator's award is consistent with NLRB policy and case law, that Smith's conduct in drafting and distributing a defamatory and malicious letter was not protected concerted activity, and that the arbitrator considered the unfair labor practice issue.

Protected concerted activity. The record supports a finding that the employee's distribution of his letter to several coworkers and to his shop steward concerning the Company's payroll deductions constituted concerted activity. The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Meyers Industries (II)*, 281 NLRB 882 (1986); *Globe Security Systems*, 301 NLRB 1219 (1991); *Alaska Pulp Corp.*, 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991). The letter dealt with the employees' working conditions affecting Smith's co-workers and was intended to correct a perceived error in the employees' payroll deductions for union dues and medical expenses, a matter of mutual concern. The concerted action was protected, because it satisfied the Section 7 requirement that the conduct was intended for mutual aid and protection. *Eastex, Inc. v. NLRB*, 437

U.S. 556 (1978); *Liberty Ashes & Rubbish Co.*, 323 NLRB 9 (1997).

Was Smith's conduct so flagrant, egregious, or so abusive that he should loose the protection of the Act? Smith testified that the purpose of his letter was "to find out an answer to [his] question" and "to avoid confrontation." Smith also conceded that he had access to his union steward and to his supervisor to express his concerns. Instead, he passed out the letter, addressed to all employees, to his steward and to several employees. The letter states as a matter of fact that the third check in the month of May "should not have had any deductions for union, medical and dental taken out." It questions "how long this has been happening," and where "is the extra money going?" Smith asserts that "the extra money being taken out of your pocket is probably being put into a bank earning interest." The letter then challenges the employees to "demand that [the money] be put into a separate check" when they finally get the money back. The last sentence theorizes that this "could be an honest mistake, [which] however, should be rectified." (Jt. Exh. 1). Clearly, the letter goes beyond a mere request to clarify the payroll deductions, particularly considering the testimony of Nicholas Gabriele, chief shop steward, who received the letter from Smith early in the morning of June 2, 2003. Gabriele testified that he read the letter, and that he explained to him how the dues were taken out, namely that they were taken out biweekly, not monthly. Nevertheless, Smith told him to take the letter to human resources.

In his testimony, Weininger, manager of human resources, confirmed that he obtained the letter from Gabriele, and that he was aware the letter had been distributed to several employees. According to his interpretation, statements therein accused the Company of stealing, "not only is the Company stealing from their pockets, but . . . have a secret bank account somewhere earning interest on their money" (Tr. 70). He testified (Tr. 72):

> I interpreted it that he was accusing the company of the same theft for either retired, prior terminated employees, employees who may have resigned, employees who had worked for Kvaerner since its inception.

Weininger also testified that a shop steward later came to his office with several employees expressing their concern about Smith's accusations. Three weeks later, on June 20, 2003, Weininger posted a memorandum and distributed to all production employees an explanation how the deductions were computed, pointing out in particular that the Company correctly based the deductions on 26 pay periods during a year (R. Exh. 1). This was necessary, according to Weininger, because "it caused a great deal of damage to [his] credibility, the credibility of management in general, the credibility of the relationship between management and the union, because this letter could be interpreted as the union having permitted the company to steal from its employees all these years" (Tr. 79). Although the Respondent did not suffer any financial damage as a result of the incident, a credibility issue lasted for a month in Weininger's opinion, because employees were not sure whether their paychecks were accurate.

The Respondent's additional reasons for the discharge, notably those contained in the discharge letter, such as impersonating a shop steward, and distributing literature on company time without a supervisor's authorization, were contradictory and inconsistent with the Respondent's testimony. For example, when asked at the hearing, whether the silent steward reference was a factor in the discharge, Weininger testified that it was not. Weininger also admitted that he stated at the arbitration hearing that it did not matter whether the letter was distributed on company time. In subsequent testimony, he equivocated and added that Smith acted without authorization in posting his letter. I, therefore, conclude that the real reason for the discharge, in Weininger's opinion, was the content the letter that clearly accused the Company of wrongdoing, illegal wrongdoing (Tr. 93).

Such accusations are not new. The distribution of handbills by technicians critical of the employer's service to the community during negotiations for a new contract, were held to be unprotected activity, because the handbills disparaged the product or services of their employer during a critical time. *NLRB v. Electrical Workers Local 1229),* 346 U.S. 464 (1953). When an employee makes statements on a local television program about her employer which were materially false, but which disparage her employer or its products and services, that employee "exceeds the boundaries of protected activity." *St. Luke's Episcopal-Presbyterian Hospital, Inc. v. NLRB*, 268 F.3d 575 (8th Cir. 2001). Inflammatory remarks are not protected. *American Steel Erectors,* 339 NLRB 1315 (2003). The posting of a sarcastic letter which criticized and ridiculed management for its action designed to improve the morale of the employees, was held to be unprotected, because, in the Court's opinion, the letter was intended to mock the employer rather than serve to protest working conditions. *New River Industries v. NLRB*, 945 F.2d 1290 (4th Cir. 1991). However, employees do not forfeit the protection of the Act, for making false or inaccurate allegations about their employer so long as the statements are not deliberately or maliciously false or made with reckless disregard for their veracity. *KBO, Inc*., 315 NLRB 570 (1994); *Simplex Wire & Cable Co.*, 313 NLRB 1311 (1994).

Did Smith make false allegations against his employer with reckless disregard for their veracity? The scenario in this case is analogous to two cases cited by the parties. *United Cable*, 299 NLRB 138 (1990), and *Pincus Bros.*, 237 NLRB 1063 (1978), enfd. denied 620 F.2d 367 (3d Cir. 1980), like the instant case, involve written statements drafted and disseminated by an employee critical of the employer. In United Cable, the employee spoke up at an employee meeting suggesting higher wages. He also posted a letter after the meeting on the bulletin board, challenging the employees to question the veracity of a company official and urging that "they start putting more money in the employees' pockets." Even though the employee was found to have accused the company of lying, the Board declined to defer to the arbitrator's finding that the employee's conduct was only partially protected. The Board found that his letter was not so flagrant, violent, or extreme as to remove the employee from the protection of the Act. Similarly in Pincus Brothers, the Board refused to defer to the arbitration award. There, after a meeting between the company and the union to discuss employees' concerns, the discriminate distributed a handbill, refer-

ring to the meeting as a circus, stating that the employees might suffer pay cuts in their "already stinking pay checks." Even though the arbitrator found the leaflet to misrepresent and distort facts relating to employment practices and the company's business practices, the Board found that the handbill constituted protected concerted activity. However, on appeal, the Court disagreed and refused enforcement of the Board's decision for several reasons, namely, that the leaflet contained defamatory material known to be false, that the employee's actions constituted unprotected disloyalty, that the employee intended to interfere with the collective bargaining relationship, and that the employee's conduct may not have been concerted.

Unlike the situation in *Hertz Corp.*, 326 NLRB 1097 (1998), where the employee's deliberate false accusations and reckless disregard for the truth was not protected, Smith honestly believed that he was correct. He did not deliberately misrepresent the facts in making his accusations against the employer. His suppositions about the Respondent's payroll deductions turned out to be false.

In his letter, Smith went further, however, than merely voice his erroneous assumptions. He also queried what the Company was doing with the extra money, and stated that the "extra money being taken out of your pocket . . . is probably being put into a bank earning interest." Stating that the "interest is also due you," he tells his coworkers, including current and past employees, "when you finally get the money back, as you will, demand that it be put into a separate check." Clearly, his erroneous accusations about the Company's ill-gotten gains was both, unnecessary to his stated purpose and, therefore, inflammatory.

I agree with the Respondent that the statements imply that the Company had been stealing from the paychecks of past and current employee as a result of improper payroll deductions. But I also find the Company's unusually swift and drastic reaction exaggerated. It is clear by now that the silent shop steward reference was of little consequence other than a possible attempt by its author to add a touch of credibility or puffery to the letter. Yet the termination letter dramatized it as an impersonation. Similarly, whether the letter was distributed on company time or without company authorization adds little to the consideration of the fundamental issue in this case. I also find that Weininger's testimony inconsistently and dramatically exaggerated the employees' reactions to the letter.

Without a doubt, the Respondent discharged this employee because he had drafted and distributed the letter and argues that it took the same action involving another employee who had distributed a letter about the Company's use of hazardous materials (GC Exh. 3). In that incident, the accusations against the Company were far more serious. The letter, typed on company stationary, was entitled "The numerous and sudden deaths of coworkers." It blames the deaths of employees on a contaminated work environment. This scenario may show an absence of a discriminatory motive here.

On balance, while I consider Smith's testimony evasive and his actions misguided, the conciliatory last sentence in the letter, that this "could be an honest mistake," persuades me to find the letter to be protected concerted activity.

Deferral to arbitration. In a strongly worded opinion, the arbitrator upheld the discharge (Jt. Exh.3). The arbitrator found, inter alia, that the letter clearly implied "that the Company may be intentionally cheating its current and retired employees," that it was "intended primarily to incite his co-workers," that it can be construed "as defamatory and as an intentional act designed to damage the Company's relationship with its workers," and, significantly, that there "is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action." The arbitrator also chided the Company for its "hyperbolic characterization" and "exaggerated description of the grievant's denigration of the Company's honesty," but reserved his strongest criticism for Smith, not only for his evasive testimony and his disingenuous explanations, but also for having "irresponsibly denigrated the Company's integrity to the bargaining unit."

The General Counsel takes issue with the arbitrator's award, "because it failed to acknowledge the obvious protected concerted nature of Smith's letter." That alone renders his decision repugnant to the Act, according to the General Counsel. Similar criticism is directed at the arbitrator's finding that the manner of signing the letter as silent shop steward was "engendering potential confusion." The General Counsel assigns additional errors in the arbitrator's decision, none of which, standing alone, would render the award repugnant to the Act. While I agree that the arbitrator should not have relied upon Smith's manner of signing the letter as a factor justifying the discharge, it is also clear that it was not one of the deciding factors. The arbitrator's decision states as follows:

> There is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action. His action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech under these circumstances, when the grievant elected to ignore the appropriate and ready available avenues of inquiry and redress, and in no way taken in concert with other employees.

Although he clearly considered the issue, the General Counsel is correct that the arbitrator failed "to find protected concerted activity." Moreover, the arbitrator also applied an improper standard, according to the General Counsel, in determining "when otherwise protected activity loses protection," by finding that the letter "exceeded the bounds of fair comment or personal opinion," because the standard is more stringent than simply fair comment.

However, the arbitrator's standard for finding Smith's activity to have lost protection, was, his "action recklessly publishing accusations of dishonesty," a theme which the arbitrator repeatedly emphasized, as follows: Publishing a screed implicitly accusing the Company of cheating its employees, denigrated the Company's integrity, written accusation clearly implying that the Company may be intentionally cheating its current and past employees, causing appreciably damage to the Company's reputation, publishing unjustified allegations of intentional bad faith, attack on the Company's integrity and trustworthiness, and accusations of financial misconduct.

The arbitrator's finding, that the "grievant's intent was clearly to incite his co-workers," was also not unjustified, for

his chief shop steward, Gabriele testified in the present case, that before he handed the letter to management, he had explained to Smith how union dues were taken out, which would suggest that Smith already had a partial answer. Yet Smith insisted that Gabriele proceed anyway with the distribution of the letter.

As already stated, I found Smith's activities to be protected under the Act. Accordingly, I believe that the arbitrator was wrong. But to set aside the arbitration award, it need be more than wrong, it must be "palpably wrong." *Olin Corp*., 268 NLRB 573, 574 (1998). The arbitrator had considered the protected and concerted nature of the controversy, and he rejected it after he was presented with the facts relevant to resolving the unfair labor practice. The "Board has considerable discretion to respect an arbitration award and to decline to exercise its authority over alleged unfair labor practices if to do so will serve fundamental aims of the Act." *Carey v. Westinghouse*, 375 U.S. 261, 271 (1964). An award need not be entirely consistent with Board precedent. Indeed, even if it is only arguably correct and "would be decided differently in a trial de novo," the arbitral result can be sustained. *NLRB v. Pincus Bros., Inc.*, 620 F.2d 367, 374 (3d Cir. 1980); *Wabeek*, 301 NLRB 694 (1991). I cannot find that the arbitration award was palpably wrong or totally unjustified. I, therefore, find that the Board should defer to the arbitrator's award.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Deferral to arbitration is appropriate in this case.

On these findings of fact and conclusions of law, and on the entire record, I issue the following

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. February 23, 2005.